6/6/01 **IN THE UNITED STATES DISTRICT COURT**
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOM GRECO, HARVEY'S LAKE AMPHITHEATER, INC., FACTORY CONCERTS, INC., and GRECO HOLDINGS, INC.,	:	
Plaintiffs,	:	
	:	**NO. 99-CV-2136**
v.	:	
	:	**(CHIEF JUDGE VANASKIE)**
KEITH BECCIA, JIM KOPLIK, JOHN SCHER Individually; METROPOLITAN ENTERTAINMENT CO., INC., UNIVERSAL MUSIC GROUP, OGDEN ENTERTAINMENT, and OGDEN CORPORATION, INC.,	:	
Defendants.	:	

ORDER

June 6, 2001

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On February 29, 1998, the plaintiffs filed a Complaint against Keith Beccia ("Beccia"), Jim Koplik ("Koplik"), John Scher ("Scher"), and Metropolitan Entertainment Co., Inc. ("Metropolitan"), in the Court of Common Pleas of Luzerne County. On March 13, 1998, Defendants removed the case to this Court on the basis of diversity of citizenship. Plaintiffs subsequently moved to file an amended complaint or, in the alternative, to voluntarily dismiss the case under Fed.R.Civ.P. 41(a)(2). The proposed Amended Complaint sought to add as defendants the Lackawanna County Commissioners, whose joinder would destroy diversity jurisdiction. Defendants opposed the motion on the ground that Plaintiffs could not allege a

viable claim against the County Commissioners. On August 26, 1998, this Court granted Plaintiffs' motion for voluntary dismissal without prejudice.

On June 14, 1999, Plaintiffs filed a complaint in Luzerne County Court, seeking relief from the defendants named in the original Complaint, as well as, inter alia, the Commissioners of Lackawanna County, John Corcoran,[1] Ray Alberigi, and John Senio (collectively, "the County Commissioners"). Because the County Commissioners were citizens of Pennsylvania, diversity of citizenship was lacking, and Defendants were unable to remove the case to federal court.

In response to preliminary objections filed by Defendants, Plaintiffs filed an Amended Complaint on July 27, 1999 and a Second Amended Complaint on September 7, 1999. On September 20, 1999, the County Commissioners filed preliminary objections to Plaintiffs' Second Amended Complaint, arguing that as to them venue in Luzerne County was improper under Pa.R.Civ.P. 2103(b). On November 29, 1999, the Honorable Ann H. Lokuta issued an Order sustaining the County Commissioners' preliminary objections to venue and allowing Plaintiffs to petition the court to transfer the causes of action against the County Commissioners to the Court of Common Pleas of Lackawanna County.[2] Thereafter, by letter dated December 8, 1999, Plaintiffs pointed out to Judge Lokuta that Pa.R.Civ.P. 1006(e) does

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[1] The correct name of this County Commissioner is Joseph Corcoran.

[2] The Order stated that "[t]he preliminary Objections of Defendants . . . alleging improper venue, are SUSTAINED, without prejudice to Plaintiffs to petition the Court for transfer of Plaintiffs' causes of action against said Defendants to the Court of Common Pleas of Lackawanna County."

not require the filing of a petition to effectuate a transfer and requested that the claims against the County Commissioners be transferred to Lackawanna County.[3] In response to this request, Judge Lokuta issued an Amended Order dated December 10, 2000, transferring the causes of actions against the County Commissioners to the Court of Common Pleas of Lackawanna County with the costs and fees for transfer and removal of the record to be paid by Plaintiffs.

As a result of Judge Lokuta's Order, the non-diverse defendants were removed from the action in Luzerne County and diversity of citizenship existed between the remaining parties. On December 10, 1999, the same day that Judge Lokuta directed that the claims against the County Commissioners be transferred and before the period for filing an appeal of her ruling had expired, Defendants filed a Notice of Removal in this Court. (Dkt. Entry #1.)

On January 10, 2000, Plaintiffs moved to remand this case to state court, arguing that because the dismissal of the non-diverse defendants had not been the result of a voluntary act of the plaintiffs, removal of the case from state court had been improper. (Dkt. Entry #6.) On February 13, 2001, Plaintiffs' motion to remand was granted. The bases for this ruling were that the non-diverse defendants had not been joined fraudulently in the state court action and their dismissal from that suit was not the result of a voluntary act of the plaintiffs. A certified

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[3] Pa.R.Civ.P. 1006(e) states, in pertinent part, that "[i]f a preliminary objection to venue is sustained and there is a county of proper venue within the State the action shall not be dismissed but shall be transferred to the appropriate court of that county. The costs and fees for transfer and removal of the record shall be paid by the plaintiff."

copy of the order of remand was mailed to the clerk of the Luzerne County Court.[4]

On February 27, 2001, Defendants filed a Motion for Reconsideration of this Court's February 13, 2001 Order. (Dkt. Entry #58.) Pointing out that after the remand motion was presented, the claims against the County Commissioners were dismissed by the Court of Common Pleas of Lackawanna County, Defendants assert that Plaintiffs' failure to oppose the Lackawanna County Court's dismissal of the non-diverse County Commissioners shows that the non-diverse County Commissioners were no longer parties to this controversy as a result of Plaintiffs' voluntary act and that they had been fraudulently joined to defeat diversity jurisdiction in the first instance. Plaintiffs, citing 28 U.S.C. § 1447(c) and (d), argue that this Court lacks jurisdiction to entertain the motion for reconsideration. Oral argument was held on March 27, 2001.

The general statutory provision governing the availability of review of remand orders is 28 U.S.C. § 1447(d), which provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise. (Emphasis added.)

In Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976), the Supreme Court held

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[4] The docket sheet in this case reflects that a certified copy of the remand order was sent on February 13, 2001. An acknowledgment of receipt of the remand order by the Luzerne County Court was docketed on February 16, 2001. (Dkt. Entry #57.)

that "§ 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 127 (1995) (citing Thermtron, 423 U.S. at 345-46).[5] In short, § 1447(d) "divests the federal courts of jurisdiction to review a . . . remand order when the order is based on a defect in removal procedure or lack of subject matter jurisdiction."[6] Hudson, 142 F.3d at 156 (citing Thermtron, 423 U.S. at 346; Quackenbush v.

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[5] Section 1447(c) provides:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

[6] In Hudson United Bank v. LiTenda Mortgage Corp., 142 F.3d 151, 156 (3d Cir. 1998), the Third Circuit noted that "[a]t the time of Thermtron, the text of § 1447(c) . . . read: 'If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of costs.' " Hudson, 142 F.3d at 157 n.8 (citing Thermtron, 423 U.S. at 342)). Although "the statute now speaks of remands for lack of subject matter jurisdiction, and remands for 'any defect other than lack of subject matter jurisdiction,' " the Third Circuit concluded that "[r]ather than take this language as a wholesale rejection of *Thermtron* and a dramatic expansion of § 1447(d), we will assume that Congress did not mean to upset the *Thermtron* limits on § 1447(d), and that they remain in effect unchanged by the intervening textual modifications to § 1447(c)." Hudson, 142 F.3d at 157 n.8 (emphasis in original). The court found "[t]his conclusion to be supported by the legislative history of the 1996 amendment." Id. (citing H.R.. REP. NO. 104-799 at 2-3

Allstate Ins. Co., 517 U.S. 706, 710-11 (1996)). The Third Circuit explained:

> The purpose of the rule is to prevent a party to a state lawsuit from using federal removal provisions and appeals as a tool to introduce substantial delay into a state action. Without § 1447(d), a party to a state action could remove the action to federal court, await remand, request reconsideration of the remand, appeal, request rehearing, and then file a petition for a writ of certiorari, all before being forced to return to state court several years later. To avoid this delay, Congress has fashioned an exception to the general rule of review, and made a district court's initial determination that removal was inappropriate a nonreviewable one.

Id. at 156 (citations omitted).

In the instant case, this Court applied the "voluntary-involuntary" rule and concluded that removal was improper since the transfer of venue for the claims against the County Commissioners was not due to any voluntary act of Plaintiffs, but was instead the result of a state court decision and the operation of a state court rule.[7] This Court did not affirmatively state in its February 13, 2001 Memorandum and Order that this case was remanded pursuant to § 1447(c). However, under these circumstances, when the voluntary-involuntary rule is used as a test of diversity jurisdiction for purposes of removal, and a court determines that removal was improper, § 1447(c) is the basis for remand. See e.g., Leong v. Taco Bell Corp., 991

(1996), reprinted in 1996 U.S.C.C.A.N. 3417, 3418-18 (suggesting that the textual changes were designed only to clarify congressional intent on the timing of remands made for reasons other than lack of subject matter jurisdiction)).

[7] "The 'voluntary-involuntary' rule states that in the absence of fraudulent joinder, an action cannot be removed unless a voluntary act of the plaintiff causes a change that makes the case removable." Leong v. Taco Bell Corp., 991 F.Supp. 1237, 1238 (D.Or. 1998).

F.Supp. 1237 (D. Ore. 1998) (finding that remand based on application of the voluntary-involuntary rule falls within § 1447(c) and, therefore, was not subject to review on motion for reconsideration); Perry v. McNulty, 794 F.Supp. 606 (E.D. La. 1992) (finding that remand based on voluntary-involuntary rule falls within § 1447(c)); Power v. Norfolk & Western Railway Co., 778 F.Supp. 468 (E.D. Mo. 1991) (same); Camino Camper of San Jose, Inc. v. Winnebago Industries, Inc., 715 F.Supp. 964 (N.D. Cal. 1989) (same); Abels v. State Farm Fire and Casualty Co., 694 F.Supp. 140 (W.D. Pa. 1988) (same); Jenkins v. National Union Fire Ins. Co. of PA, 650 F.Supp. 609 (N.D. Ga. 1986) (same); See also In re Iowa Manufacturing Co. of Cedar Rapids, Iowa, 747 F.2d 462, 463 n.2 (8th Cir. 1984) (stating that "the legislative history of the removal sections of the Judicial Code suggest that the 'voluntary-involuntary' rule was incorporated into the Code and, thus, might be inferred to be part of the grounds specified in § 1447(c) (citing Weems v. Louis Dreyfus Corp., 380 F.2d 545, 548 (5th Cir. 1967); Sen. Rep. No. 303, 81st Cong., 1st Sess., reprinted in 1949 U.S. Code Cong. Serv. 1248, 1268). Accordingly, § 1447(d) would appear to bar reconsideration of the remand order.

Defendants, citing Snapper, Inc. v. Redan, 171 F.3d 1249 (11th Cir. 1999), argue that the bar on review of remand orders does not apply where, as here, the remand is based on the absence of subject matter jurisdiction. The Third Circuit, however, has unambiguously held otherwise. For example, in Feidt v. Owens Corning Fiberglas Corp., 153 F.3d 124 (3d Cir. 1998), the court stated:

> Section 1447(c) provides for remand on the basis of either a procedural defect or lack of jurisdiction; thus, section 1447(d) prohibits review of remand orders based on the district court's finding of either of those conditions. Moreover, section 1447(d) prohibits review of remand orders "whether erroneous or not and whether review is sought by appeal or by extraordinary writ."
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> Accordingly, we repeatedly have held that section 1447(d) bars review of remand orders based upon the types of subject matter jurisdiction issues which district courts routinely make under section 1447(c).

Id. at 126. (citations omitted). In Feidt, the district court concluded that it lacked subject matter jurisdiction at the time of removal. The defendant urged on appeal that the district court had ignored some of the plaintiffs' claims that purportedly established a basis for jurisdiction under 28 U.S.C. § 1442(a)(1), the federal officer removal provision. According to the defendant, the lower court's failure to address the jurisdictional significance of certain claims rendered § 1447(d) inapplicable. The Third Circuit rejected this assertion, explaining:

> Section 1447(d), in prohibiting review of remand orders, contemplates that district courts may err in remanding cases. Indeed " [n]o matter how faulty we might consider the district court's reasoning or methods, section 1447(d) prohibits us from reviewing an action the district court was empowered to take, and one that Congress intended to be final."

Id. at 128. (citations omitted). The Third Circuit concluded that "the district court's decision [was] a routine jurisdictional determination under section 1447(c)," and that § 1447(d) precluded appellate review of the remand order. Id. Accordingly, under Third Circuit precedent, remand orders based upon lack of subject matter jurisdiction, such as the order at issue here, are not

subject to appellate review under § 1447(d).[8] Moreover, when a case is remanded pursuant to § 1447(d), a district court lacks jurisdiction to reconsider its remand order once a certified copy of the remand order has been sent to the state court. Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 226 (3d Cir. 1995) ("Thus, where the bar of § 1447(d) applies our precedent suggests a district court would lack jurisdiction to reconsider its order of remand once a certified copy of the remand order has been sent to the state court."); see also New Orleans Public Service, Inc. v. Majoue, 802 F.2d 166, 167 (5th Cir. 1986) (per curiam). Accordingly, since § 1447(c) was the basis for remanding this case to state court and a certified copy of this Court's order of remand has been sent to the Luzerne County Court of Common Pleas, this

[8] In Snapper, the case upon which Defendants rely, a secured creditor filed a state court action to recover from guarantors on a debt, and the guarantors removed the action to federal court based on diversity of citizenship. 171 F.3d at 1251. The district court granted the motion to remand, holding that the forum selection clause in each of the security agreements signed by the guarantors constituted a waiver of their right to remove. Id. at 1251-52. The issue before the Eleventh Circuit was whether a remand order based upon a forum selection clause fit within one of the grounds specified in § 1447(c), thereby barring appellate review pursuant to § 1447(d). The court noted that "§ 1447(c) implicitly recognizes two bases upon which a district court may -- and in one case must -- order a remand: when there is (1) lack of subject matter jurisdiction or (2) a defect other than a lack of subject matter jurisdiction." Id. at 1252-53. The court further recognized that "[o]ther grounds for remand exist . . . that are external to the removal process and do not depend on any 'defect' in the removal itself," with the most common examples of these grounds arising in the contexts of forum selection clauses, abstention, and supplemental jurisdiction. Id. at 1253. The court concluded that appellate review of the district court's remand order was not barred under § 1447(d). Snapper, besides arising in another jurisdiction, is plainly distinguishable. Thus, Snapper does not support a determination that the bar of § 1447(d) is inapplicable.

Court lacks jurisdiction to decide Defendants' Motion for Reconsideration.[9]

THEREFORE, for the foregoing reasons, **IT IS HEREBY ORDERED THAT:**

(1) Defendants' Motion for Reconsideration (Dkt. Entry #58) is **DISMISSED;**

(2) Defendants' Motion to Strike Supplemental Declaration of Robert M. Cohen (Dkt. Entry #71) is **DISMISSED**; and

(3) The Clerk of Court is directed to mark this case as **CLOSED** in this Court.

Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

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FILED: 6/6/01

[9] Defendants filed a Motion to Strike Supplemental Declaration of Robert M. Cohen (Dkt. Entry #71). Because this Court will not address the merits of Defendants' Motion for Reconsideration, the Supplemental Declaration of Robert M. Cohen, as well as the motion to strike this declaration, need not be considered. Accordingly, Defendants' motion to strike will be dismissed as moot.